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No. 02-695

In The Supreme Court of the United States

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

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INTRODUCTION: REASONS FOR DENYING THE PETITION

The Treasurer of Iowa asks this Court to review and overturn a decision by the Iowa Supreme Court invalidating, under both the Iowa and the U.S. Constitutions, a draconian 36 percent adjusted gross receipts tax on slot machine revenues at Iowa racetracks. The tax, which has no precedent elsewhere in the country, arose from an unusual set of circumstances. Iowa's racetracks were going broke. A rescue package was arranged, which included legal authority for these racetracks to install slot machines on their premises. Riverboats already had such authority in Iowa. At the last minute, however, an amendment was added due to the efforts of a riverboat district legislator. The amendment subjected slot machine revenues at racetracks, but not on riverboats, to a maximum 36 percent tax rate rather than the existing 20 percent rate. The Iowa Supreme Court held that this discriminatory tax violated the Equal Protection Clauses of both the Iowa Constitution and the Fourteenth Amendment and struck it down.

There is no basis for this Court to review the Iowa Supreme Court's decision because it rests on adequate and independent state grounds. Its decision was based on the Iowa Constitution, not just the U.S. Constitution, and there is no reason to believe that the Iowa Supreme Court's views on Iowa's Constitution would change regardless of any ruling by this Court. That is especially true when the controversy is centered entirely on Iowa.

Furthermore, even as a matter of federal constitutional law, there is no need to review the Iowa Supreme Court's decision because its analytical framework was

unquestionably correct. That court went through all the proper steps. It rightly characterized the case as a "rational basis test" case, and recognized that the Respondents had a "heavy burden" and had to "negate every reasonable basis upon which to uphold the statute." However, while the rational basis test permits a law to be sustained by "rational speculation," *Heller v. Doe*, 509 U.S. 312, 320 (1993), a law may not be upheld when "the facts preclude[ ] any plausible inference" that an asserted justification was the actual legislative purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992). Citing *Nordlinger*, the Iowa Supreme Court held that this confiscatory and discriminatory tax could not be reconciled with the undisputed legislative purpose of helping the racetracks to recover from economic distress. Accordingly, the tax failed an essential element of the rational basis test.

The Iowa Supreme Court did not engage in improper fact-finding. Nor did it demand that Petitioner affirmatively prove that the discriminatory tax served a legitimate state purpose. Rather, the court simply accepted certain basic undisputed facts from the summary judgment record about the legislative purpose behind the tax and the harmful effects of the tax, such as were considered by this Court in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989). Based on that irrefutable record, the Iowa Supreme Court found that the facts precluded any inference that promoting riverboats and river towns could have been the legislature's actual purpose for the tax. The Iowa Supreme Court's conclusion was correct. In any event, quarrels about how a state supreme court applied a properly stated

rule of federal constitutional law do not warrant review by this Court. *See* Supreme Court Rule 10.

STATEMENT OF FACTS

I. Introduction.

This case presents questions concerning the constitutionality of a 36 percent adjusted gross receipts tax on slot machines at nonprofit racetracks. That rate is 80 percent higher than the tax rate on the same revenues from the same machines used in the same way on for-profit riverboats. Petitioner's "Statement of the Case" ignores critical undisputed facts that were part of the summary judgment record below, particularly undisputed facts as to legislative history and legislative purpose that were central to the Iowa Supreme Court's decision. The following facts are taken from the summary judgment record and have never been challenged by Petitioner.

II. The Discriminatory Tax.

Iowa law imposes a tax *generally* on the adjusted gross receipts received from gambling games of 5 percent on the first $1 million of adjusted gross receipts annually, 10 percent on the next $2 million of adjusted gross receipts, and 20 percent on any adjusted gross receipts in excess of $3 million. Iowa Code § 99F.11 (first sentence). Prior to 1994, only riverboats could offer gambling games, including slot machines and card games. The revenues from those games were taxed in accordance with the foregoing law at a maximum rate of 20 percent.

In 1994, however, the Iowa legislature enacted H.F. 2179 which legalized slot machines at racetracks, but subjected any "gambling games at racetrack enclosures," beginning January 1, 1997, to a special tax rate that would escalate annually up to 36 percent on adjusted gross receipts in excess of $3 million. The challenged provision, which became the second sentence of Iowa Code § 99F.11, read as follows:

> However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent.

III. Taxation of Slot Machine Revenues in Other Jurisdictions.

No other state in our nation has such a discriminatory tax. Other states that allow slot machines and/or video lottery terminals generally tax their revenues at an identical rate regardless of where the machine is located. For example, that is true in Montana, Nevada, Oregon, South Carolina, and South Dakota. Louisiana, the only state besides Iowa that authorizes slot machines on riverboats and at racetracks, has a slightly lower tax rate (18 percent vs. 18.5 percent) for slot machines at racetracks. Louis. Rev. Stat. §§ 27:91, 27:393. New Mexico authorizes video lottery terminals at racetracks and in other locations, and its gaming tax is uniformly 25 percent of the "net take." New Mexico Stat. § 60-2E-47. No other state has a tax that is 80 percent higher based solely on the location of the gambling device.

Furthermore, no other state has an adjusted gross receipts tax on gaming revenue that approaches 36 percent. Illinois recently enacted a tax of 35 percent on an entity's annual adjusted gross gaming receipts above $100 million. However, the effective Illinois tax rate is much lower because the 35 percent rate only applies when annual receipts exceed $100 million. 230 Ill. L.C.S. § 13.

IV. The Legislative History of the Discriminatory Tax.

How did this discriminatory tax come about in Iowa? By 1993, all the racetracks in Iowa were experiencing serious financial difficulties. Respondent Racing Association of Central Iowa ("Prairie Meadows") had entered bankruptcy in 1991, had emerged from bankruptcy in 1993, but was continuing to lose money. The racetracks operated in Council Bluffs and Dubuque, respectively, by Respondents Iowa West Racing Association ("IWRA") and Dubuque Racing Association, Ltd. ("DRA") were consistently losing money, and indeed the track in Council Bluffs ("Bluffs Run") was on the verge of insolvency.

Additionally, the Iowa riverboats were being threatened by competition from other states, particularly Illinois, which allowed excursion gambling without Iowa's stringent loss limits of $200 per excursion and $5 per hand or play.

Before the commencement of the 1994 session of the Iowa legislature, a consensus agreement was reached among representatives of the racetrack and riverboat interests and legislators from the affected areas. The consensus legislation provided for (a) slot machines to be authorized at racetracks, (b) the elimination of loss limits

on riverboat gambling, and (c) continuation of the existing 20 percent maximum tax rate on adjusted gross receipts from gambling games. This consensus agreement was set forth in legislation which 12 members of the Iowa House introduced as an amendment to H.F. 2179.

On March 15, 1994, however, a state representative from Woodbury County, a county on the Missouri River which contains a riverboat but no racetracks, offered an amendment that provided for a 40 percent gross receipts tax on gambling games *at racetracks*. Neither he nor any other supporter of the amendment gave any reasons in the House debate for a higher tax on the same machines at racetracks.

On March 17, this representative agreed to have his amendment reconsidered so that the highest rate on gambling games at racetracks would be 36 percent rather than 40 percent of adjusted gross receipts, and to provide a two-year moratorium (*i.e.*, until January 1, 1997) for the higher rate to begin to take effect in order to give racetrack supporters an opportunity to repeal the tax disparity in the next General Assembly.

As so amended, H.F. 2179 passed the Iowa House that day. It later passed the Iowa Senate and was signed by the Governor. The Speaker of the Iowa House, who was a gambling opponent and controlled the House agenda, had made it clear that he would allow H.F. 2179 to be considered only once in the House. Thus, as a practical matter,

any effort to remove the discriminatory tax in the Senate would have defeated the entire legislation.[1]

The Iowa legislature did not amend § 99F.11 in subsequent sessions and, thus, in 1997, the higher tax rate began to phase in. No other activity is taxed by the State of Iowa at a rate of 36 percent. By way of comparison and contrast, Iowa taxes sales of tobacco products at 22 percent. Iowa Code § 453A.43.

V. The Impact of the Discriminatory Tax.

As noted above, each of the Respondents is a nonprofit entity. By Iowa law, these entities are required to distribute *any* net income not used to pay off debts or to supplement horse or dog purses for educational, civic, public, charitable, patriotic or religious uses. Iowa Code § 99F.6(4)(a). As a practical matter, this means that the net income of the Respondents goes back into the community, either through payments to local governments or through charitable contributions.

Respondent Prairie Meadows has distributed over $186 million to Polk County (the county that includes Altoona, where it is located, as well as Des Moines, Iowa's largest city) and over $12 million to various charities from

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[1] In the proceedings below, Respondents submitted several affidavits from Iowa legislators. The district court denied Petitioner's motion to strike the affidavits, noting that they described the background of the legislation but did not offer individual legislators' opinions as to legislative intent or motive. Thus, they were admissible under Iowa law. *See Miller v. Bair*, 444 N.W.2d 487, 488 (Iowa 1989) (court relied on three legislator affidavits).

1995 through 1999. Respondent DRA has distributed over $7.5 million to charities and over $27.5 million to the City of Dubuque. Bluffs Run has distributed over $45 million to various educational, civic and charitable organizations since 1995.

Each of the racetracks continues to lose money today on the racing portion of their operations, and depends on slot machine revenues for survival. However, as the higher tax on gaming revenues from slot machines at Iowa racetracks has phased in, that tax has had a predictably adverse impact on the racetracks. For calendar year 2002, until the Iowa Supreme Court rendered its decision on June 12, the tax rate was 32 percent. Had the Supreme Court not ruled the discriminatory tax unconstitutional, it would have continued to increase by 2 percent each succeeding calendar year until it reached 36 percent in 2004. By 2003 or at the latest 2004, Respondent Prairie Meadows would have had little or no profits to distribute to Polk County and to charities. Meanwhile, Respondent DRA expected a loss on operations which would have necessitated closure of the facility and the loss of its economic and employment benefits. It is also undisputed that Bluffs Run, which competes with riverboats in the same community, is competitively disadvantaged by the disparate gaming tax.

VI. Proceedings in the Iowa Courts.

Respondents originally brought this action in the Iowa District Court for Polk County. They challenged the second sentence of Iowa Code § 99F.11, which established the far higher tax on adjusted gross receipts from slot machines located at racetracks, as unconstitutional on several

grounds. On December 4, 2000, ruling on cross-motions for summary judgment, the district court upheld the discriminatory tax and dismissed Respondents' claims.

Significantly, although Petitioner urged five possible justifications for the discriminatory tax under the rational basis test, including obviously insubstantial justifications like "revenue maximization,"[2] the district court accepted none of the Petitioner's arguments. Instead, it came up with its own justification – that the legislature could have intended that river towns or riverboats receive "a beneficial tax rate" as a means of promoting their interests. *See* Pet. App. 34.

On appeal, the Iowa Supreme Court reversed. To begin with, it noted:

> [T]he heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. . . .

Pet. App. 8.

Critically, the Iowa Supreme Court then pointed out – and Petitioner has never disputed – that the Iowa legislature's undisputed purpose in 1994 was to save the racetracks

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[2] If revenue maximization were a sufficient justification under the rational basis to sustain a tax discrepancy, then every tax disparity would always be constitutional. *Volusia County Kennel Club v. Haggard*, 73 So.2d 884, 886-87 (Fla. 1954) (holding that "the desire to get more money from the race tracks" is insufficient to sustain a tax under the Equal Protection Clause).

from economic distress. Levying an 80 percent higher tax on the revenues from slot machines at racetracks frustrated that goal. Reviewing both the justification developed by the district court and the various justifications advanced by the State, the court concluded that "[e]ach justification ignores the plain fact that this differential tax completely defeats the alleged purpose of the 1994 legislation." Pet. App. 15. The court added:

> At a minimum, the tax frustrates the legislative purpose in permitting racetracks to operate. The legislation goes even further, however, by disabling an industry it was allegedly designed to aid.

Pet. App. 15.

Following the Iowa Supreme Court's June 12, 2002 decision, Petitioner requested rehearing. On August 6, 2002, the court denied the petition for rehearing. This Petition followed.

THE DECISION BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

The Petition should not be granted because the Iowa Supreme Court's decision rests on adequate and independent state grounds. The Iowa Supreme Court specifically stated that it was invalidating the second sentence of Iowa Code § 99F.11 under both the Iowa Constitution (Art. I § 6) and the Fourteenth Amendment to the U.S. Constitution. Pet. App. 6. Indeed, it cited primarily Iowa precedents, such as *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), and *Gleason v. City of Davenport*, 275 N.W.2d 431 (Iowa 1979).

While the Iowa Supreme Court "usually" interprets federal and Iowa Equal Protection Clauses the same way, *see Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994), it has not hesitated to interpret Iowa Const. Art. I, § 6 differently from the Fourteenth Amendment when it disagrees with a precedent of this Court.

Thus, in *Bierkamp*, 293 N.W.2d 577, the Iowa Supreme Court held that Iowa's guest statute, which prohibited guest passengers in an automobile from suing the driver of that automobile for negligence, created an improper classification that violated Iowa Const. Art. I § 6. That court acknowledged that in interpreting the U.S. Constitution, it was bound by prior decisions of this Court upholding guest statutes against Fourteenth Amendment challenges. *Id.* at 579. Indeed, in one of its own decisions, the Iowa Supreme Court had previously held that Iowa's guest statute did not violate the Fourteenth Amendment. *Bietz v. Horak*, 271 N.W.2d 755, 759 (Iowa 1978). Nonetheless, the Iowa Supreme Court emphasized that this Court's Fourteenth Amendment jurisprudence was merely "persuasive," and "not binding," in construing Art. I § 6. Accordingly, it struck down Iowa's guest statute as violative of the Equal Protection Clause in the Iowa Constitution. 293 N.W.2d at 580-85.

As Petitioner points out, this is a case about "Iowa's tax system." These are Iowa issues, affecting Iowa citizens. Because of the state's current budget deficit, the Iowa Supreme Court knew its decision would be controversial to some extent, but it made it anyway. There is no reason to believe that the Iowa Supreme Court's previously expressed views on the constitutionality of Iowa Code

§ 99F.11 *under the Iowa Constitution* would be modified by any decision of this Court concerning requirements of the U.S. Constitution. As the Iowa Supreme Court has said on another occasion, "Unquestionably, this court must determine Iowa constitutional requirements, and in so doing is under no obligation to uphold a local statute merely because the United States Supreme Court has deemed it not unconstitutional." *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 23 (Iowa 1977).

This case is not *Michigan v. Long*, 463 U.S. 1032 (1983). Unlike the Michigan Supreme Court, the Iowa Supreme Court did not cite exclusively federal cases or give the impression that it "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Id.* at 1043-44. To the contrary, the vast majority of the Iowa Supreme Court's citations were to Iowa precedents. Pet. App. 6-17.

The Iowa Supreme Court has also made it clear, repeatedly, that it views U.S. Supreme Court interpretations of the Fourteenth Amendment as merely non-binding "guidance" in interpreting the Iowa Constitution. *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999); *Putensen v. Hawkeye Bank*, 564 N.W.2d 404, 408 (Iowa 1997); *Huff*, 256 N.W.2d at 23; *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d 583, 593 (Iowa 1971). As that court has reminded the public on several occasions, "[I]t is the exclusive prerogative of our court to determine the constitutionality of Iowa statutes challenged under our own constitution." *Callender*, 591 N.W.2d at 187; *Putensen*, 564 N.W.2d at 408.

THE IOWA SUPREME COURT'S INTERPRETATION OF THE FOURTEENTH AMENDMENT WAS CONSISTENT WITH THIS COURT'S PRECEDENTS

I. Introduction.

The Petition also should be denied because the Iowa Supreme Court's ruling was correct as a matter of federal constitutional law. The 36 percent tax imposed by the second sentence of Iowa Code § 99F.11 is unique, confiscatory, and discriminatory. The Iowa Supreme Court correctly held that this disparate tax rate on slot machine revenues at racetracks violated the Equal Protection Clause in the Fourteenth Amendment, as well as its counterpart in the Iowa Constitution. There is no rational reason for the same revenues from the same machine used in the same way to be taxed at an 80 percent higher rate because of the machine's location.

Three points should be emphasized at the outset. First, *no* other state taxes slot machine revenues at substantially different rates based on where the slot machine is located. This is significant. As this Court has said in a recent rational basis case, "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Second, had the discriminatory tax not been struck down by the Iowa Supreme Court, it would have had a dramatic negative impact on nonprofit racetracks, the communities they serve, and the horse and dog racing industry in Iowa. This is a 36 percent revenue tax, not an

income tax. It must be paid "at the pump" whether the racetrack is making money or not.

Third, the tax originated when a single legislator from a riverboat district proposed an amendment to the existing statutory scheme, which had taxed all slot machine gross receipts at the same rate. His amendment added a special discriminatory tax on gambling games at racetracks. It was accepted with a clause postponing its effect so it could be removed in a subsequent legislative session. This removal, however, did not occur. The precedents make clear that this type of legislative history is relevant. While the rational basis test permits a law to be sustained by "*rational* speculation," *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added), it may not be upheld when "the facts preclude[ ] any plausible inference" that an asserted justification was the actual legislative purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992). "Even the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321.

The Petition filed in this case is a curiosity, for at least two reasons. For one thing, Petitioner never tells this Court what he thinks the rational basis for the tax is. Read pages 11 through 20 of his Petition ("Reasons for Granting the Petition for Certiorari"). Re-read them. You will not see any reference to a supposedly legitimate end that could be served by the second sentence of § 99F.11. It is telling that, at this very late stage in the proceedings, Petitioner still cannot articulate a plausible reason for the statute.

Second, Petitioner never addresses the relevant federal constitutional principles that the Iowa Supreme

Court relied upon in invalidating the statute under the Fourteenth Amendment. We now turn to those principles.

II. The Iowa Supreme Court's Application of This Court's Equal Protection Precedents Was Correct.

In striking down the second sentence of § 99F.11, the Iowa Supreme Court held that, under the rational basis test, an asserted justification for a law that could not have been the legislature's actual goal should not be accepted. As the court put it, "In determining whether the tax statute is constitutional, we must consider whether the asserted purpose behind this tax could have been the genuine goal of the legislation. [Citing *Nordlinger*, 505 U.S. at 15-16.]" Pet. App. at 10.

That proposition is well-enshrined in this Court's constitutional jurisprudence. This case presents the question whether the identical activity – slot machine gaming – can be taxed at widely disparate rates, depending solely on whether the slot machine in question is in a facility on dry land or in a facility that floats. Racetracks and riverboats offer the same product, in the same manner, to essentially the same customers.

To try to defend this discriminatory tax, Petitioner offered in the trial court several possible justifications under the rational basis test. Respondents, meeting their burden, demonstrated that *none* of these justifications met the rational basis test. The trial court evidently agreed, because it came up with a *new* justification not argued by Petitioner – *i.e.*, promotion of riverboats and river towns – and sustained the tax on that basis.

Respondents have always recognized that, in order to prevail, they had to negate all possible justifications given for the tax. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618-22 (1985) (striking down New Mexico law after rejecting both justifications that had been accepted by the New Mexico court). And, Respondents did so. Under this Court's precedents, a justification for a legislative classification is invalid under the rational basis test if it fails to meet any of the following three requirements: (a) legitimate state purpose; (b) reasonable relationship between means and ends; and (c) the purpose could have been a plausible basis for the legislation. This is confirmed by this Court's decisions which embody the following rules:

- To satisfy the rational basis test, the classification must further a legitimate state purpose. For example, in *Hooper*, this Court struck down a New Mexico veteran's tax exemption that distinguished between persons who resided in the state before 1976 and those who did not. That discrimination did not further a legitimate state purpose. 472 U.S. at 623.

- The relationship between the classification and its goal "must not be so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11. There must be a "reasonable" relationship, not a "casual" relationship, between the means and the ends. *Williams v. Vermont*, 472 U.S. 14, 23 n. 8 (1985). For example, in *Williams*, this Court struck down a Vermont law that granted a use tax exemption to residents but not to nonresidents who purchased cars out-of-state. The Court rejected the justification that the exemption prevents unfair double taxation (*i.e.*, taxation by two entities for the use of only one entity's roads) even though the State argued that its residents are more likely to use their vehicles only in Vermont. *Id.* at 33-34 (dissenting opinion). In this Court's view, the means chosen were not sufficiently related to the ends. *Id.* at 25-27. Similarly, in *Romer*, this Court applied the rational basis test to invalidate Colorado's anti-gay rights amendment, rejecting several asserted justifications (such as private citizens' freedom of association) on the ground that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." 517 U.S. at 635.

- Even if the purpose is permissible and the means are not attenuated, that may not be enough. If the party challenging the legislation can show that the asserted "justification" could not actually have been relied upon, then it may not be used to uphold the statute. *Nordlinger*, 505 U.S. at 15-16.

The Iowa Supreme Court duly considered both the justifications that had been advanced by Petitioner and the one that the trial court relied upon. Pet. App. 11-15. In rejecting these justifications, the Iowa Supreme Court cited *Nordlinger* and invoked the third principle noted above.

As this Court said in *Nordlinger*, "[T]his Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Id.* at 15. The *Nordlinger* Court gave *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989), as an example of a case "where the *facts* precluded any plausible inference" that the asserted purpose for a taxing scheme was the actual purpose. 505 U.S. at 16 (emphasis added). In *Heller*, 509 U.S. 312, 321, this Court reaffirmed that "even the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation."

In other words, while a court is entitled to engage in "rational speculation" concerning the legislature's goal, and that speculation need not be supported by actual evidence, *FCC v. Beach Communications, Inc.*, 408 U.S. 307, 315 (1993), the court may not attribute a purpose to the legislature that the record affirmatively shows *could not have been* the legislature's goal. *Heller*, 509 U.S. at 321; *Nordlinger*, 505 U.S. at 15; *Allegheny Pittsburgh*, 488 U.S. at 345; *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n. 16 (1975) (also citing cases).

Allegheny Pittsburgh, a tax case, illustrates this point. There, a West Virginia county followed a method of property assessment that resulted in only minor adjustments to assessed value for property tax purposes until a property was sold, at which time a full market-value adjustment would be made. While the Court suggested in *Allegheny Pittsburgh* and confirmed in *Nordlinger* that these property-tax classifications *might have served* a legitimate legislative goal and met the rational basis test in an appropriate case, they did not do so there because relevant legislative sources showed that West Virginia had intended to adopt a true market value approach. In short, the legislation failed the rational basis test because the goal advanced by the government conflicted with the unquestioned legislative goal of a market value method of property assessment. *Allegheny Pittsburgh*, 488 U.S. at 345.

The Iowa Supreme Court correctly held that this was an *Allegheny Pittsburgh*-type of case. The undisputed purpose of the 1994 legislation was "to help the racetracks recover from economic distress." Pet. App. 11. Yet the legislation "also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots." *Id.*

One cannot justify such a surtax as a way of promoting riverboats or river towns, as the trial court attempted to do, because such a justification does not comport with "the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321. As noted by the Iowa Supreme Court, the 80 percent higher tax burden on slot machine revenues at racetracks would be a rational way of promoting the riverboat gambling industry only if "the reason for it was to drive the racetracks out of business" – a purpose which conflicts with the unquestioned actual goal of the 1994 legislation. Pet. App. 14. In summary, this is another one of those admittedly rare cases where the discrimination is simply irrational in the context of the undisputed legislative goal.

Because the discriminatory tax did not rationally further a legitimate state purpose, the Iowa Supreme Court correctly held that it violated the Equal Protection Clauses in both the Iowa and U.S. Constitutions. *Allegheny Pittsburgh*, 488 U.S. at 345-46 (striking down discriminatory property tax assessment scheme as violating the Equal Protection Clause); *Hooper*, 472 U.S. at 623 (striking down modest property tax exemption, as violative of the Equal Protection Clause, accorded to Vietnam War veterans who were New Mexico residents before May 1976).

The Iowa Supreme Court also could have rejected the asserted justifications for the disparate tax on the ground that they failed the second of the above three tests. Even if the goal is legitimate, the means chosen must have some *reasonable* relationship to those ends. A relationship that is "far removed," *Romer*, 517 U.S. at 635, 116 S.Ct. at 1629, or "casual," *Williams*, 472 U.S. at 23 n.8, 105 S.Ct. at 2472 n.8, does not work. For example, imposing a confiscatory tax on

racetracks is a very crude and highly indirect way of "promoting" river boats and river towns. That is especially true when two of the three racetracks (DRA and IWRA) are located in river towns.

In summary, the legislative history unmistakably shows that the 1994 law was supposed to be a life preserver for the racetracks, not their last rites. To attribute to the legislature a purpose of driving those same tracks out of existence is irrational and impermissible. Indeed, it violates the teaching of *Allegheny Pittsburgh* and *Nordlinger* that the court may not evaluate the constitutionality of a scheme in light of purposes that are excluded by the legislative history. 488 U.S. at 344-46; 505 U.S. at 16. The Iowa Supreme Court properly struck down the second sentence of § 99F.11 under the Fourteenth Amendment, as well as under Art. I § 6 of the Iowa Constitution.

III. *Central State University* Is Readily Distinguishable From This Case.

Petitioner confuses the situation in *Central State University v. American Assn. of University Professors*, 526 U.S. 124 (1999) (*per curiam*), with the circumstances of the present case. In *Central State University*, the Ohio Supreme Court held that a law authorizing public universities to develop workload standards for professors and exempting those workloads (but not those of other public employees) from collective bargaining violated the Equal Protection Clause of the Fourteenth Amendment. The State had argued that the law was an attempt to address a decline in the amount of teaching performed by professors. However, in the critical passage of its opinion, the Ohio court concluded that

> there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching.

699 N.E.2d 463, 469 (Ohio 1998).

This Court correctly concluded that such an approach violated the rational basis test. As this Court explained, "One of the statute's objectives was to increase the time spent by faculty in the classroom: the imposition of a faculty workload was an entirely rational step to accomplish this objective. . . . The fact that the record before the Ohio courts did not show that collective bargaining in the past had led to the decline in classroom time for faculty does not detract from the rationality of the legislative decision." 526 U.S. at 128.

However, *Central State University* has no bearing on this case. The Iowa Supreme Court did not penalize the Petitioner for failing to offer proof that the second sentence of § 99F.11 actually furthered a legitimate legislative goal. Rather, it did something quite different and entirely appropriate. It reviewed the undisputed facts surrounding the enactment of § 99F.11, and concluded that those facts precluded an argument that the tax differential was intended to promote riverboats or river towns or to further the other asserted justifications for the statute. *See Nordlinger*, 505 U.S. at 16; *Allegheny Pittsburgh*, 488 U.S. at 344-46.

IV. Petitioner's Arguments About Impermissible Fact-Finding Are Unfounded.

Petitioner's assertions about improper fact-finding are unsupported. Petitioner seems to be arguing that a court should never consider evidence in determining the constitutionality of a statute under the rational basis test and should dismiss all such challenges for failure to state a claim. If that were the case, obviously no challenge could ever succeed, yet some do. Moreover, if actual facts are irrelevant, Petitioner fails to explain why he has loaded the appendix to his Petition with material from the summary judgment record. *See* Pet. App. 58-69.

Respondents presented evidence, not disputed or rebutted by Petitioner, which demonstrated there was no rational basis for the dramatically disparate tax treatment of slot machine revenues at racetracks and at riverboats. The facts referred to by the Iowa Supreme Court are fully supported by the record and that court was entitled to consider them. Even now, Petitioner does not deny that the summary judgment record supports the facts that were set forth by the Iowa Supreme Court in its opinion and discussed on pages 15-16 of his Petition. Moreover, even if the Iowa Supreme Court had committed some factual error, and it did not, that would not warrant granting the Petition. *See* U.S. Supreme Court Rule 10.

Lastly, Petitioner's argument that it is improper for a court to consider any post-enactment consequences of a law, regardless of how inevitable or obvious they were when the law was adopted, falls of its own weight. The problem with this argument, of course, is that the discriminatory tax did not take effect immediately. It has been phased in over time and would not have reached 36

percent until 2004. Thus, if Petitioner were right, any legislature could insulate any piece of legislation from constitutional challenge simply by delaying its effect.

Moreover, it is not as if these facts are controversial or should have come as a surprise to anyone. The critical factual points which the Iowa Supreme Court made were that "racetracks must pay drastically more additional tax than riverboats are required to pay" and that the tax "frustrates the racetracks' responsibility to distribute money to local government and charitable organizations" and "to contribute to the overall economy of the State." Pet. App. 12-13. Those facts are self-evident and were as obvious to everyone in 1994 as they are today. They are not, and cannot be, disputed by Petitioner.

THE PETITION DOES NOT MEET THE STANDARDS OF SUPREME COURT RULE 10

This case does not meet the standards of Supreme Court Rule 10. The Iowa Supreme Court did not promulgate a new legal standard. Its discussion of the rational basis test travels through familiar territory. *See, e.g.*, Pet App. 6-7, 10-11. At worst, if the Petitioner's criticisms were correct (and they are not), the Iowa Supreme Court cited the right precedents but then "deviated" from them in deciding this specific case. This Court does not sit for the purpose of correcting such errors.

Seeking to make this case appear more deserving of this Court's review, Petitioner argues that the State is faced with more than $100 million in refunds to Respondents as a result of the Iowa Supreme Court's decision. Petitioner also argues that the Iowa Supreme Court's

decision has led an Iowa trial court, in another case, to refuse to dismiss a lawsuit challenging part of the funding mechanism for Iowa's educational system. *See Coalition for a Common Cents Solution v. State*, No. EQCV26737 (Iowa Dist. Ct. for Warren County, October 8, 2002) (Pet. App. 71-76). Neither of these arguments has anything to do with the considerations for granting certiorari set forth in Supreme Court Rule 10.

To begin with, Petitioner's concerns about tax refunds are overstated. By law, the Respondents are required to disburse any net income they receive for the benefit of Iowans by turning that money over to local governments and charities. *See* Iowa Code § 99F.6(4)(a). Therefore, a broad segment of Iowa's population will benefit from these tax refunds. It is also undisputed that Iowa's state government did not even receive the benefit of racetrack slot machine revenues until the mid-1990's. Even with the Iowa Supreme Court's ruling, it retains all those revenues up to the original 20 percent tax rate. Iowa's state government operated without a share of proceeds from racetrack slot machines for approximately 150 years of its existence. Iowa should be able to manage its fiscal affairs in the future with just a non-discriminatory share of those revenues.

Similarly, Petitioner's arguments about the judicial impact of the Iowa Supreme Court's decision are exaggerated. Petitioner complains that an Iowa district court in Warren County recently refused to dismiss a challenge to part of Iowa's funding mechanism for public education. *See Coalition for a Common Cents Solution*. That is not altogether surprising. Many state supreme courts have found that education is a fundamental right under their state's constitution. *See DeRolph v. State*, 677 N.E.2d 733, 741 n.

6 (Ohio 1997) (citing cases that have invalidated state educational funding systems). As the Warren County district court noted, that question has not been resolved by the Iowa Supreme Court. Pet. App. 74-75. In any event, it appears that at most the Warren County district court may have confused two concepts – (a) approving a legislative purpose that the record affirmatively shows could not have been the legislature's actual purpose (which is what Petitioner asked the courts to do in this case) and (b) engaging in rational speculation as to what the legislative purpose might have been (which is what the Warren County district court was asked to do). Pet. App. 75-76. It is not this Court's role to grant certiorari because an Iowa trial court may have misunderstood an Iowa Supreme Court opinion.

What these arguments really highlight is the insufficiency of Petitioner's grounds for seeking review of this case by this Court. Petitioner's real complaint is that Iowa's judicial branch has issued a ruling that causes some discomfort for its executive and legislative branches. However, concerns of federalism strongly weigh against this Court's involvement in such a controversy. That is particularly true when (as here) the decision rests on adequate and independent state grounds, the tax that was invalidated is *sui generis*, and, in any event, the Iowa Supreme Court properly applied this Court's equal protection precedents.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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